Georgia Power Company *and* Bobby Lewallen. Case 10–CA–33301

April 7, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 9, 2002, Administrative Law Judge Lawrence W. Cullen issued the attached bench decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as further discussed below, and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to promote employee Bobby Lewallen to a supervisory position because he engaged in protected concerted activities. To remedy this violation, the judge recommended that the Respondent be ordered to cease and desist from the unlawful conduct, to offer Lewallen a promotion to the supervisory position, and to make Lewallen whole for any loss of earnings or other benefits he sustained as a result of the unlawful denial of the promotion. We agree with the judge that the Respondent violated the Act as alleged. However, contrary to our dissenting colleague, we do not agree with the judge's recommended remedy. For the reasons set forth below, we have decided not to require the Respondent to offer Lewallen a promotion to a supervisory position.

In its exceptions, the Respondent contends, inter alia, that the judge's recommended remedy exceeded the Board's remedial power under Section 10(c) of the Act because it required that the Respondent promote Lewallen to a supervisory position, a position that is excluded from coverage under Sections 2(3) and 2(11) of the Act. The Respondent also argues that the remedy is inconsistent with the Act because the promotion of an employee to a supervisory position is an area exclusively reserved for management. *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982).

As an initial matter, we reject the Respondent's position that the Board lacks the authority to order Lewallen promoted to a supervisory position because such positions are not covered by the Act. Indeed, in *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 188 (1973), the Supreme Court noted that "[t]he Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against." Thus, we recognize both that we have the authority to order that Lewallen be made a supervisor and that we have exercised our authority to impose such a remedy in the past.[4]

However, we find merit in the Respondent's contention that the judge's proposed remedy in this case (i.e. requiring the Respondent to promote Lewallen to a supervisory position) potentially infringes on the Respondent's managerial hiring prerogatives. For example, in *Ford Motor Co*., supra, the court affirmed the Board's finding that the employer violated the Act by denying two employees' promotions to supervisory positions because they protested the employer's promotion policies. The court agreed with the Board that the company unlawfully failed to promote the employees because they engaged in protected conduct, but it vacated the portion of the Board's Order that required the employer to offer the employees the supervisory positions they were denied.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order and substitute a new notice in accordance with our findings herein.

[4] The Supreme Court has stated that "Section 10(c) . . . charges the Board with the task of devising remedies to effectuate the policies of the Act," and that its remedial power is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964), citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Board orders will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. NLRB*, supra, at 216 (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). The Board's remedial authority to require that an employer promote an employee to a supervisory position has been upheld by the courts in *Oil Workers v. NLRB*, 547 F.2d 575, 588–591 (D.C. Cir. 1976), cert. denied sub nom. *Angle v. NLRB*, 431 U.S. 966 (1977), relying in part on *NLRB v. Bell Aircraft*, 206 F.2d 235 (2d Cir. 1953).

In so doing, the court found that it was not "the intent of the Act . . . to include Court enforcement of Board orders that require management to promote a specific employee to a position within the supervisor ranks." *Ford Motor Co.*, supra at 159. The court noted that in formulating an appropriate remedy for the unfair labor practices, the Board must not "[assume] the managerial responsibility of weighing a wide variety of factors involved in a decision of whether an employee is suitable for a more responsible position with additional duties." *Ford Motor Co.*, supra at 159.

We find the reasoning of *Ford Motor Co*. persuasive, and accordingly we hold that, while it is not outside the scope of our remedial authority to require an employer to offer an employee a promotion to a supervisory position, it would not effectuate the policies of the Act to order a "coerced promotion" in this case. Id. at 159. Lewallen has never held a supervisory position in the Respondent's company, and has never been selected by the Respondent's management to be a supervisor. Therefore, by ordering his promotion to the supervisory ranks at this time we would be effectively assuming the "managerial responsibility of weighing a wide variety of factors involved in [the] decision" as to whether Lewallen is suitable for a supervisory position. *Ford Motor Co.*, supra at 159. In the exercise of our remedial discretion, we choose not to assume that "managerial responsibility" here. Rather, we shall leave to the Respondent the ultimate decision as to whether Lewallen should be offered a supervisory position. Accordingly, we do not adopt the judge's recommendation that the Respondent be ordered to offer Lewallen a promotion to the supervisory position he was denied.

Our dissenting colleague cites three cases where the Board ordered an employer to offer a supervisory position to a discriminatee.[5] However, there is no indication in those cases that the employer excepted to the remedy. Certainly, there is no discussion of that matter.

Our colleague notes that, in *Richboro,* the Board itself imposed the remedy. But that is because the judge had dismissed the allegation, the General Counsel excepted, the Board found merit in that exception, and it thus necessarily had to impose a remedy. However, (and this is our sole point), the employer did not argue the remedial issue before the Board; the employer was content to argue for affirmance of the judge.

Similarly, our colleague notes that the Board has the power to impose a remedy sua sponte. We do not quarrel with this proposition, but it is beside the point. Our point, again, is that the employers in these cases did not raise the issue involved herein.

In any event, the three cases clearly differ from the instant one. In *Richboro*, supra at 1268 fn. 11, the Board found that the employer's discrimination was the "sole reason" that it denied the employee a position to a supervisory position and that his supervisor had admitted that the discriminatee was more qualified and had more seniority than the employee who got the promotion. The judge here did not make such a finding. Although the judge found that the "real reason" that the Respondent denied Lewallen his promotion was due to his protected concerted conduct, that finding does not indicate either (1) that this was the only reason for the denial, or (2) that he would certainly have gotten the promotion in the absence of that conduct. Indeed, the evaluation committee was evenly divided between Lewallen and Edwin Cash (who eventually got the promotion) and Cash was rated higher than Lewallen in some areas, including communication skills.

Moreover, in *Little Lake Industries*, supra at 1055, the employee in question had been notified of his selection for the promotion prior to the discriminatory conduct (indicating that the employer had selected the employee for the promotion, and then changed its mind).

Finally, in *Advanced Mining Group*, supra at 503, the employer had previously selected the employee to serve as a temporary supervisor, but refused to do so again after she participated in protected concerted conduct. Thus, in all three of the above-cited cases, the evidence showed that the employee in question would certainly have been selected for the supervisory position if not for the protected conduct. We are simply not convinced that such a showing has been made in this case.

Our colleague also argues that the finding of a violation means that, but for the discrimination, the Respondent would have promoted Lewallen to a supervisory position. That argument confuses the sufficiency of the evidence necessary to find the violation–preponderance of the evidence-with the evidentiary showing that the Board has required, as explained above, to impose as a remedy the promotion of an employee to a managerial position. As to the violation here, the Respondent did not rebut the General Counsel's case by showing that it would not have promoted Lewallen even if he had not engaged in union activity. But this is different from a clear affirmative showing that the Respondent planned to promote that employee and did not carry through with this plan because of the employee's protected activity. Where, as here, we are intruding into an important aspect

[5] *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979); *Little Lake Industries*, 233 NLRB 1049 (1977); *Advanced Mining Group*, 260 NLRB 486 (1982), enfd. 701 F.2d 221 (D.C. Cir. 1983).

of managerial prerogative, we would not allow such intrusion, absent such a clear showing.

We recognize, however, that the Respondent must be held accountable for its unlawful conduct and that we must fashion a remedy that will erase, as far as practicable, the effects of the Respondent's unlawful denial of the promotion to Lewallen. In fashioning our remedy in this case, we are guided in part by the remedy we ordered in *Ford Motor Co.*, 266 NLRB 633 (1983), pursuant to the court's remand. In *Ford Motor*, the Board accepted the court's remand as the law of the case and ordered the employer to *reconsider* the affected employees for supervisory positions, employing "every reasonable precaution to ensure that such reconsideration is untainted by the events precipitating th[e] proceeding." Id. at 633. In the exercise of our remedial authority, we find this to be an appropriate remedy in the instant case. However, we believe that this remedy is insufficient by itself to fully remedy the unfair labor practices in this case. Therefore, in order to encourage the Respondent to fully and fairly reconsider Lewallen for the supervisory position and to place Lewallen in a position reasonably similar to that which he would have been in had the discrimination against him not occurred, we find it appropriate to also order the Respondent to make Lewallen whole for any loss of pay and benefits he sustained as a result of the unlawful denial of the promotion.[6] Accordingly, we shall order the Respondent to pay Lewallen backpay at the rate Lewallen would have received if he had been selected for the supervisory position, and continue to pay him at the supervisory rate until such time as he is promoted to a supervisory position.

This remedy is designed to effectuate the policies of the Act by effectively erasing some of the adverse effects of the discriminatorily motivated denial of the promotion to Lewallen,[7] and by encouraging the Respondent to exercise its managerial promotion responsibilities in a way that is not prejudicial to Lewallen.

In sum, a monetary remedy provides relief for the discriminatee, without intruding into an area of managerial prerogative. Further, it provides an incentive, but not an obligation, to promote Lewallen into the supervisory position.[8]

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to promote employee Bobby Lewallen to a supervisory position, we shall order that the Respondent cease and desist therefrom and take certain actions designed to effectuate the policies of the Act. We shall order the Respondent to reconsider Lewallen for a supervisory position and to employ every reasonable precaution to ensure that such reconsideration is not tainted by the events that precipitated this proceeding. We shall also order that the Respondent make Lewallen whole for any loss of earnings and other benefits he suffered as a result of the Respondent's unlawful discrimination, and that backpay and future pay be calculated at the supervisory rate until such time that Lewallen is hired into a supervisory position. Backpay and future pay shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).[9] Interest shall be computed as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Georgia Power Company, Gainesville, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to promote its employees to supervisory positions because they engage in protected concerted activities under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reconsider Bobby Lewallen for a promotion to the supervisory position he was unlawfully denied, or if that position no longer exists, to a substantially equivalent position, and employ every reasonable precaution to en-

[6] The Board has ordered make whole remedies in other cases in which employees were unlawfully denied promotions to supervisory positions. See, e.g., *St. Anne's Hospital*, 245 NLRB 1009 (1979), enfd. 648 F.2d 67 (1st Cir. 1981); *Bell Aircraft Corp.*, 101 NLRB 132, 135 (1952), enfd. 206 F.2d 235 (2d Cir. 1953).

[7] We recognize, as pointed out by the dissent, that this remedy does not fully remedy all of the adverse effects of the unlawful denial of the promotion. However, it does effectively remedy the financial impact of the unfair labor practices.

[8] See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), where the Board grants a monetary remedy as an incentive for the employer to bargain in good faith on the effects of a managerial decision.

[9] *Ogle Protection* applies to remedy a violation of the Act that does not involve cessation or denial of employment. "To the extent . . . that [an employer's] unlawful conduct resulted in employees receiving less than they would have been entitled to for their work had the Act not been violated, those losses are properly remedied under the *Ogle Protection* formula." *CAB Associates*, 340 NLRB No. 171, slip op. at 3 (2003).

sure that such reconsideration is untainted by the events precipitating this proceeding.

(b) Make Bobby Lewallen whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him in the manner set forth in the Amended Remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to promote Bobby Lewallen, and within 3 days thereafter, notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay and future pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Gainesville, Georgia copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 7, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 7, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues and the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to promote employee Bobby Lewallen to a supervisory position because he engaged in protected concerted activity. My colleagues, however, refuse to order the Respondent to offer a promotion to Lewallen as a remedy for its unfair labor practice. In doing so, my colleagues have unnecessarily denied Lewallen a permissible and effective remedy, and have substituted in its place a punitive one. For the reasons set forth below, I dissent.

As recognized by my colleagues, Section 10(c) of the Act grants the Board broad discretionary authority to devise remedies that effectuate the policies of the Act. "The underlying policy of Section 10(c) of the Act . . . is 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Trustees of Boston University*, 224 NLRB 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The Board has exercised its broad remedial authority in cases involving discriminatory denials of promotions to supervisory positions by ordering employers to offer the affected employees' promotion to the supervisory positions they were unlawfully denied. For example, in *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979), a case remarkably similar to the instant case, the Board found that an employer unlawfully denied an employee a promotion to a supervisory position because the employee engaged in protected activity. In remedying the violation, the Board ordered the respondent to offer to promote the employee to a supervisory associate clinical coordinator position, with backpay to make him whole for any losses he may have suffered by reason of the unlawful denial of the promotion.

Similarly, in *Little Lake Industries*, 233 NLRB 1049 (1977), the Board ordered an employer to offer an employee a promotion to the supervisory position of foreman in order to remedy its discriminatorily motivated denial of that promotion to the employee. See also, *Advanced Mining Group*, 260 NLRB 486, 503, 515 (1982), enfd. 701 F.2d 221 (D.C. Cir. 1983) (employer ordered

to offer temporary supervisor position to employee who was unlawfully denied a promotion).[1]

My colleagues agree that the Board has the authority to order an employer to offer a promotion to an employee,[2] and they acknowledge that the Board has done so in the past. However, they decline to order such a remedy in this case. By doing so, they are sub silencio overruling Board precedent that granted this remedy, and they are unnecessarily limiting the Board's remedial authority in a manner not required by the Act.

Following the reasoning of *Ford Motor Co*., supra, my colleagues decline to order the Respondent to offer Lewallen a promotion in this case because they believe that by ordering such a remedy the Board would be impermissibly assuming the managerial responsibility of selecting an employer's supervisory workforce. My colleagues' concern about the Board's involvement in the supervisory selection process in this case is unfounded. Here, the judge found, and my colleagues and I agree, that the Respondent failed to prove that it would not have promoted Lewallen to the supervisory position in the absence of his protected concerted activity. By rejecting the Respondent's defense that Lewallen would not have been selected for the supervisory position for legitimate business reasons, we are effectively finding that the Respondent would have selected Lewallen absent his protected activity. Thus, ordering the Respondent to do that which it would have done had it been acting lawfully would not be usurping the prerogative of management to select its supervisory workforce.[3] Because the Respondent's selection committee determined that Lewallen is qualified for the position, we would not be ordering the Respondent to promote an unqualified individual to the supervisory ranks or be substituting our business judgment for that of the Respondent.[4] For these reasons, there is no impediment to the remedy recommended by the judge.[5]

In place of the judge's reasonable and appropriate remedy, my colleagues have fashioned one that is both illogical and punitive. Specifically, my colleagues have ordered the Respondent to reconsider Lewallen for the supervisory position and to pay Lewallen at the supervisory rate until he is promoted. If the Respondent were to reconsider Lewallen in a nondiscriminatory manner and were lawfully to decline to promote him, it would nevertheless still be required to pay him as if he were a supervisor. Thus, my colleagues are effectively imposing a penalty on the Respondent, i.e., ordering it to pay in perpetuity for a job not being performed.[6]

My colleagues assert that this case is different from the cases in which we have ordered full promotions to supervisory positions, because the General Counsel has not proven that the Lewallen "certainly" would have been selected as a supervisor. By finding the 8(a)(1) and (3) violation, however, we are finding that the General Counsel proved that Lewallen was denied the position because of his union and protected concerted activities. I am aware of no other discrimination cases where the Board, having found the violation, has looked at the relative weight of the General Counsel's evidence in fashioning the remedy for the discrimination. By requiring this additional showing, my colleagues are in effect watering down the remedy and making it a much less effective deterrent for the discriminatory conduct, and I am not

[1] My colleagues find *Richboro*, *Little Lake Industries*, and *Advanced Mining Group* distinguishable in part because there is no indication that the employer excepted to the remedy in those cases. My colleagues' reliance on the absence of remedial exceptions is misplaced. First, in *Richboro*, the remedial issue was squarely before the Board because the Board itself devised the remedy for the unlawful failure to promote. (Pursuant to exceptions filed by the General Counsel, the Board reversed the judge's dismissal of this allegation.) Second, even if, as speculated by my colleagues, there were no exceptions to the judges' recommended remedies in *Little Lake Industries* and *Advanced Mining Group*, the remedial issues would still have been before the Board for consideration. "[M]atters of remedy are traditionally within the Board's province, and may be addressed by the Board *sua sponte*." *R.J.E. Leasing Corp*., 262 NLRB 373 fn. 1 (1982). The fact that there was no separate discussion of the remedial issues by the Board in those cases does not mean that the appropriateness of the judges' recommended remedies was not considered by the Board.

[2] The Board's remedial authority to require an employer to promote an employee to a supervisory position has been upheld by the courts in *Oil Workers v. NLRB*, 547 F.2d 575, 588–591 (D.C. Cir. 1976), cert. denied sub nom. *Angle v. NLRB*, 431 U.S. 966 (1977), relying in part on *NLRB v. Bell Aircraft*, 206 F.2d 235 (2d Cir. 1953). My colleagues properly refuse to follow the court's per curiam (and conclusory) opinion in *NLRB v. Ford Motor Co*., 683 F.2d 156 (6th Cir. 1982), to the extent that it questions the Board's authority to order a promotion to a supervisory position.

[3] The Respondent's selection committee determined that Lewallen was one of the top two candidates for the supervisory position. Lewallen was not selected because he engaged in protected concerted activity, not because he was unqualified to be a supervisor.

[4] Cf. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993) (employer not ordered to offer promotion to employee where employer proved that she would not have been selected for the supervisory job even absent the discrimination against her).

[5] See *Oil Workers v. NLRB*, supra, 547 F.2d at 588–591, in which the court found that an unlawfully discharged employee should have been reinstated to a supervisory position, noting that the employer's claim that the employee would not have been promoted to that position was based on reasons that had previously been rejected by the Board as pretextual in the underlying discrimination cases.

[6] In addition to being punitive, my colleagues' remedy is also not fully effective. Although it may be effective monetarily to place Lewallen in the financial position he would have been in had the discrimination not occurred, it fails to remedy the damage to Lewallen's career progression caused by the discrimination against him.

willing to join them in weakening our remedies for unlawful discrimination.

In conclusion, this case should be decided by applying the fundamental remedial principle that Board orders should "restor[e] . . . the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge*, supra, 313 U.S. at 194. Lewallen would have been promoted "but for the illegal discrimination." Therefore, to "restor[e] . . . the situation," the Board should order the Respondent to offer Lewallen the promotion he was unlawfully denied. Here, where the Respondent itself has determined that Lewallen was qualified for the promotion, there is no legal impediment to such a remedy. For these reasons, the judge correctly ordered the Respondent to offer Lewallen a promotion to a supervisory position, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Dated, Washington, D.C. April 7, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to promote our employees to supervisory positions because they engage in protected concerted activities under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL reconsider Bobby Lewallen for a promotion to the supervisory position he was unlawfully denied, or if that position no longer exists, to a substantially equivalent position, and WE WILL employ every reasonable precaution to ensure that such reconsideration is untainted by the events precipitating this proceeding.

WE WILL make Bobby Lewallen whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, with interest.

WE WILL**,** within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure and refusal to promote Bobby Lewallen, and WE WILL**,** within 3 days thereafter notify him in writing that this has been done and that our unlawful conduct will not be used against him in any way.

GEORGIA POWER COMPANY

Frank F. Rox Jr., Esq., for the General Counsel.
Laura H. Kriteman, Robert C. Stevens, and *Lisa J. Harlander, Esqs*., for the Respondent.
Kristine E. Orr, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Atlanta, Georgia, on November 21, 2002, and I delivered a Bench Decision on November 22, 2002.

I found Respondent, Georgia Power Company, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by failing and refusing to promote Bobby Lewallen to a supervisory position because of his engagement in protected concerted activities under the Act.

My Bench Decision as corrected and amended with the issuance of this Decision in final form was delivered in accordance with the authority of Section 102.35 (a)(1) of the National Labor Relations Board's Rules and Regulations and in accordance with Section 102.45 thereof, I certify the accuracy of, and attach hereto as "Appendix A" of my Bench Decision, the pertinent part of the trial transcript as corrected and amended, pages 165 to 177.

Attached as "Appendix B" are the corrections as made in the Bench Decision. [Omitted from publication.]

CONCLUSION OF LAW

Based on the entire record at the hearing, I found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent, Georgia Power Company, violated Section 8(a)(1) and (3) of the Act by failing and refusing to promote its employee Bobby Lewallen to a supervisory position for the reasons stated at the hearing. These violations have affected and unless permanently enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

I find Respondent should be ordered to cease and desist from the foregoing violations of the Act and should be ordered to instate Bobby Lewallen to the supervisory position which he was unlawfully denied or to a substantially equivalent position

if this position no longer exists. Lewallen shall be made whole for any loss of pay and benefits he may have sustained as a result of the unlawful denial of the promotion. Said backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Georgia Power Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to promote its employees to supervisory positions because of their engagement in protected concerted activities under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer to instate Bobby Lewallen to the supervisory position to which he was unlawfully denied promotion or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bobby Lewallen whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him in the manner set forth in "the Remedy" section of this Decision, with interest.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to promote Bobby Lewallen and within 3 days notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director of Region 10 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Atlanta, Georgia location copies of the attached notice marked "Appendix C.[2]" Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington D. C. December 9, 2002

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APPENDIX A

P R O C E E D I N G S

November 22, 2002 10:00 A.M.

JUDGE CULLEN**:** All right. This is a Bench Decision that I'm issuing in the case of—of Georgia Power Company and Bobby Lewallen, an individual, Case No. 10–CA–33301.

STATEMENT OF THE CASE:

Lawrence W. Cullen, is the Administrative Law Judge issuing the Decision. This case was heard before me on November 21, 2002, in Atlanta, Georgia. After both parties have rested their case and upon review of the testimony and Exhibits received at the hearing and the trial Briefs and closing arguments submitted by the parties, I issue the following Bench Decision.

The Complaint alleges that Georgia Power Company, Respondent herein, and Georgia Power Company admits, and I find the charge in this case was filed by Bobby Lewallen, an individual, on September 24, 2001. I find that at all times material herein, Respondent Georgia Power Company, Respondent or the company, has been a Georgia corporation with an office and place of business located in Gainesville, Georgia, otherwise known as Respondent's facility; and that it has been engaged in the business of generating and distributing power utility service, that during the preceding twelve month period, Respondent in conducting its business operations, received revenues in

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excess of Two Hundred and Fifty Thousand dollars ($250,000), derived from producing electrical power service in Georgia to employers, which enterprises, in turn, during the same period, purchased and received goods valued in excess of Fifty Thousand Dollars ($50,000.00) from suppliers outside the state of Georgia. That at all material times Respondent has been an employer engaged in commerce within the meaning of Section

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2(2), (6) and (7), of the National Labor Relations Act; and that the International Brotherhood of Electrical Workers, Local 84 AFL–CIO–CLC, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

It is further alleged and admitted at the hearing, that Wendall Smith was a Distribution Manager; Jimmy Sykes, Jr., was a Region Distribution Manager; Linda S. Gantt was an Assistant to Manager Northeast Regional Management, and Nancy J. Huddleston was an Area Manager I. The Complaint alleges that the foregoing individuals were at all material times supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 213 of the Act. Respondent admitted this at the hearing, and I so find.

The Complaint alleges that on or about May 7, 2001, Respondent failed to promote its employee, Bobby Lewallen, to the position of Distribution Supervisor because he

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engaged in protected concerted activities for employees' mutual aid and protection, and in order to discourage other employees from engaging in Union and other concerted activities; and that by this conduct, Respondent has been interfering, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, and has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

Lewallen has been employed by Respondent since 1975, and has been a member of the Union for over twenty-five years. The Respondent and the Union commenced negotiations over post-retirement benefits. In an effort to bolster its bargaining position, the Union sent a letter to its members in early March, 2001, urging them to boycott all company sponsored events until the post-retirement issues were resolved, which letter stated in part "Because of this battle for your future security, we are asking that you stop supporting any and all company sponsored charitable events and activities and to boycott all committees or anything of a volunteer nature. Examples: safety committees, blood drives, and United Way, etc. Your Union leadership is asking you to join us

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in this battle to defend our retirement benefits."

In early March, 2001, Distribution Manager, Wendall Smith, held a meeting with his operating employees, attended by approximately twenty-five employees. This meeting was held in his district and he inquired whether the employees would participate in a Family Fun Day sponsored by the company. None of the twenty-five employees at the meeting replied verbally to the inquiry. Smith told them he needed to know and urged them to let him know. At that point, Bobby Lewallen spoke up and said that the employees were not responding because of the Union's letter asking its members not to participate in company-sponsored activities. Smith then told the employees to let him know and concluded the meeting.

In late March, 2001, Lewallen and about twelve other employees, applied for a Distribution Supervisory position in Gainesville, Georgia. Following the elimination from consideration of certain of the candidates who were not qualified for the position, there were nine remaining candidates who were interviewed by a selection committee of six Georgia Power management employees, including Smith. Lewallen received the highest score in the interview portion of the selection process, with a score of 175.5. Edwin Cash received the second highest score of 162.

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Prior to the interviews, Smith had instructed the committee to examine other factors, including work experience, performance, leadership, qualities and overall impression of the candidates. After considering all of these qualities, five of the six committee members placed Cash and Lewallen on their top three list. The committee determined that Lewallen and Cash ultimately were the top two candidates. After further discussion, a straw poll showed the committee was equally divided between Lewallen and Cash. As the committee was evenly divided, it fell to Smith to make the final decision.

Smith testified he evaluated the strengths and weaknesses of the two candidates in relying on his personal observations of the candidates during his eighteen months as Area Manager in the Gainesville office, where both of the candidates worked. Smith testified he considered other factors in addition to experience, including communication skills, adaptability and resistance to change; and the Company's concept of the "foreman of tomorrow", and demonstrated support for management policy. Smith testified he found that Cash's experience as a troubleman was significant as he worked without supervision, made numerous decisions, interacted with customers, and Cash had good communication skills. Cash had been a Union steward and had represented

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the Union and Union employees in dealings with Smith that, in so doing, had demonstrated superior interpersonal communication skills.

In contrast, Smith had noted that Lewallen had poor communication skills in some areas. Smith offered the promotion to Cash, who accepted it on May the 7th, 2001. Later on that day, Smith talked to Lewallen and told Lewallen that he had not been chosen for the promotion as a result of his remarks at the meeting concerning Family Fun Day.

Lewallen testified that at that meeting Smith told him that he had made the decision on the Distribution Supervisor position, that it had been a hard decision, and that he had awarded the job to someone else. Lewallen asked why. Smith said that Lewallen's remark concerning the Union letter urging the boycotting of company sponsored events "pissed me off and that is the reason you didn't get the job." Lewallen testified that at that point, he told Smith he needed a day off and got up to leave. Smith did not tell him that he had any other reason for awarding the promotion to someone else. With Smith's permission, he took Tuesday off.

On Wednesday, Smith came by Lewallen the first thing in the morning and asked to meet with him. Lewallen said okay, if I can have a Union brother with me. Smith agreed and Lewallen chose Jimmy Stewart to go with him to the

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meeting. Lewallen testified that at the meeting, Smith said he had better not hear Lewallen ask anyone to work unsafe and his production better not slow down, or he would have to make a management decision. Stevens objected to these comments on Lewallen's behalf. Lewallen called Linda Gantt, the assistant to the Manager of the northeast region, who had originally facilitated the interview process and rating process for this job; and had been present at the meeting in a nonvoting capacity. She told Lewallen that Smith should not have made statements, and she set up a group meeting with Region Distribution Manager, Jimmy Sykes, Jr., Smith, Gantt, and Lewallen; which meeting was taped by Lewallen with management's permission.

In that meeting, Lewallen recounted that in the May 7th meeting, Smith told him the promotion selection had been one of the hardest decisions he had ever made in his life and he had wrestled with it all weekend. Smith then said "Do you remember the day we were talking about Fun Day in the back?" Lewallen replied yes, I do. Smith then asked again, do you remember the comment you made? Lewallen said, yes, sir, I do. Lewallen said, and the comment was in regard to a letter written by the Union asking us not to participate in any company activities – if you remember the letter

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came out.

Lewallen recounted also at the taped interview, that he had said at the Fun Day meeting, Wendall, probably why nobody is speaking up is because of the letter that we received from the Union asking us not to participate in any activities. He recounted further that Smith said, on May 7th, I remember that remark you made and Bobby, that pissed me off and I hadn't forgotten and that's the reason you are not getting the job.

On the tape, Smith denies that this statement is correct. He also contends and did so at the hearing, that he had wanted to discuss all the reasons for his decision not to promote Lewallen that day, but was unable to do so as Lewallen got up to leave. At the hearing he introduced some notes that he contends contained areas of discussion he had intended to discuss with Lewallen as reasons he had not been given the promotion; such as Lewallen's alleged communication skills. Smith also stated in the taped conversation "and with your comment that day and your position in this organization, all you did was stifle twenty-five people. Now that is simply one example and one thing that went through my mind when you did not get that job."

At the hearing, Smith admitted that he had made the comment attributed to him by Lewallen, but contends that

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this was only one example that he had wanted to discuss with Lewallen as to reasons he did not promote him.

I find that the General Counsel has made a prima fascia case of violations of Section 8A1, and 3, of the Act by Respondent's refusal to promote Lewallen because of his engagement in protected concerted activities by his remarks at the meeting concerning Family Fun Day.

I find that the employees were not participating in the Family Fun Day in response to a Union letter urging them to decline to participate in voluntary company-sponsored events in support of the Union's position at the bargaining table, concerning negotiations involving post-retirement benefits. This clearly was a position which was supportive of the Union and its bargaining strategy on behalf of the employees. The voicing of this position by Lewallen, which Smith testified he regarded as interference with his meeting, clearly placed Lewallen at odds with the company's position and supportive of the Union's attempt to strengthen its bargaining position regarding post-retirement benefits by boycotting participation in voluntary company-sponsored events.

Moreover, the statement by Smith to Lewallen that he had not been awarded the supervisory position because of his remarks at the meeting was a clear admission by Smith which demonstrated the real reason for the failure to

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promote Lewallen.

With respect to the issue of concerted activity, I find that Lewallen was engaged in protected concerted activities when he made his remark, which was clearly supportive of the boycott of company activities as borne out by Smith's displeasure with the remark. The Board has upheld as protected concerted activities under the Act, the conduct of a single employee seeking to further employees objectives for improvement or protection of their wages, hours, and terms and conditions of employment. I cite therefore *Guardian Industries Corp.*, 319 N.L.R.B., 542, 1995, *Wilson Trophy Company, v N.L.R.B.*, 989 Fed2d 1502, 8th Circuit, 1993, *Circle K Corporation*, 305 N.L.R.B. 932, 1991, In the *Circle K* case, the Board held that a stated intent to organize a Union and the issuance of a letter seeking to initiate group action by a single employee constituted protected concerted activity. Citing in support of that case, *Mushroom Transportation Company v. N.L.R.B.*, 330 Fed2d, 683, 685, (Third Circuit, 1964), wherein the Court defined concerted activity as a conversation—"that a conversation may constitute a concerted activity, although it involves only a speaker and a listener, when it was engaged in with the object of initiating or preparing for group action or had some

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relation to group action in the interest of the employees."

In the case before me, it is clear that Lewallen's comments were part and partial of the Union's effort to bolster its position at the bargaining table by boycotting extracurricular activities such as the Fun Day in question. Thus as noted, this incurred the animus of Respondent's Agent, Wendall Smith, who was attempting to promote the Fun Day. I credit the testimony of Lewallen and find that Smith did make the remarks attributed to him as the reason for not promoting Lewallen. I find that Smith's testimony concerning other reasons for Lewallen and the note itself are a post-hoc effort to counter the clear admission of Smith that he did not promote Lewallen because of his

remarks at the Fun Day meeting. In this regard, I thus find that the General Counsel has established a prima facia case of violations of Section 8A1 and 3 of the Act.

Under Wright Line, a division of *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1980, Enforced 662, Fed 2d 899, First Circuit, 1981, cert denied 405, U.S. 989, (1982), the General Counsel has the initial burden to establish that the employees engaged in protected concerted activities, number one. Number two, that the Respondent had knowledge or at least suspicion of the employees' protected

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activities. Three, the employer took an adverse action against the employees. Four, a nexus or a link between the protected concerted activities and the adverse action are the underlying motive. Once these four elements have been established, the burden shifts to the Respondent to prove by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory business reason.

In the instant case, the Respondent clearly had knowledge of Lewallen's concerted activity and as demonstrated by the comments made by Smith, the Respondent through Smith, had animus against Lewallen for his participation in the concerted activity. The Respondent took adverse action against Lewallen by denying him the promotion and the protected activity was a motivating factor in this action; thus, a nexus has been shown between the protected activity and the adverse employment action.

I further find that Respondent has failed to demonstrate by the preponderance of the evidence that it would not have promoted Lewallen in the absence of the unlawful motive. The undisputed evidence established that Respondent used a sophisticated interview and rating process that resulted in a tie score between Lewallen and

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Edwin Cash, who was ultimately awarded the job; however, the ultimate decision was left up to Smith who admittedly failed to promote Lewallen because of his protected activities. I thus find that the Respondent has failed to show by the preponderance of the evidence that it would not have promoted Lewallen even in the absence of the unlawful motive.

I will prepare a remedy and recommended Order and notice upon receipt of the transcript, and it will provide that Lewallen be awarded the promotion and awarded back pay, with interest; and I will also prepare a Notice in this effect. Is there anything further before I close the record in this case?

MR. ROX: Nothing from the General Counsel.

MS. HARLANDER: Nothing, Your Honor.

JUDGE CULLEN**:** All right. Case is now closed.

(Whereupon, the hearing in this matter was closed at 10:30 a.m.)

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to promote you to supervisory positions because of your engagement in protected concerted activities under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Bobby Lewallen promotion to the supervisory position which he was unlawfully denied, or if that job no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make Bobby Lewallen whole for any loss of wages and benefits he may have sustained as a result of the unlawful discrimination, with interest.

WE WILL remove from our files all references to the unlawful discrimination against Bobby Lewallen and will inform him in writing that we have done so and that we will not use the unlawful failure and refusal to promote him against him in any way.

GEORGIA POWER COMPANY